

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHARON CARTER,

No C 05-02486 VRW

Plaintiff,

v

JO ANNE B BARNHART, Commissioner
of Social Security,

ORDER

Defendant.

Plaintiff Sharon A Carter brings this action under 42 USC § 405(g) to obtain judicial review of the Social Security Administration's (SSA's) final decision denying disability benefits under Title II of the Social Security Act (the Act). Now before the court are the parties' cross-motions for summary judgment. Doc #6; Doc #7. For the reasons stated herein, the court DENIES plaintiff's motion and GRANTS the government's motion.

I

A

Plaintiff was born on January 10, 1951, completed high school and one semester of college, then began her career as a billing and invoice administrator at Dreisbach Enterprises in Oakland, California in November 1979. AR 60, 216. In September

1 1989 plaintiff began work as a billing and computer technician at
2 Thunder Road Adolescent Treatment Center, also in Oakland, where
3 she remained until the onset of her alleged disability. AR 95.

4 Plaintiff coaches a children's track team nine months of
5 the year and claims that her initial injury took place in 1996
6 during a track meet. AR 218, 231-32, 259. Plaintiff testified
7 that two car accidents, one in September 2000, the other in May
8 2001, exacerbated the 1996 injury and caused her to become disabled
9 as of June 23, 2000 at the age of 49. AR 42, 218, 259. Plaintiff
10 claims these injuries make it impossible to perform basic job
11 functions which require her to sit for eight to ten hours per day
12 and lift/carry up to ten pounds frequently. AR 60, 77.

13 Plaintiff received treatment for her injuries by Raymond
14 W Yu, MD, an internist at Kaiser Permanente in Oakland, and Tipkins
15 Hood, MD, a private orthopedic surgeon, also in Oakland. AR 61.
16 Medical records from plaintiff's treating physicians date from
17 April 1997 through August 2004. AR 116-32, 133-69, 191-97, 204-06.

18 Plaintiff testified that she began seeing Dr Yu in
19 February 1996 (following her initial injury) for treatment of back
20 pain, sciatica and high blood pressure. AR 61. The record,
21 however, only contains Kaiser records from April 1997 through
22 August 2004. See AR 133-69, 191-203. These records indicate
23 plaintiff's hypertension was controlled with Atenol, and that her
24 chief complaint was back pain. Id.

25 The Kaiser records show an April 1997 MRI of plaintiff's
26 lumbar spine indicating "small broad-based central, left paramedian
27 and lateral disc protrusion at the L5-S1 level, resulting in mild
28 left L5 neutral foraminal compromise, mild flattening of the

1 ventral thecal sac and impingement on the left * * * S1 nerve-root
2 axillae * * *," as well as "[g]rade I L3-4 and L4-5
3 spondylolistheses with evidence of minor bilateral facet
4 arthropathy * * *." AR 131-32. The records further indicate that
5 plaintiff underwent approximately five physical therapy sessions
6 between May and July 1999 to treat sciatica, decrease pain, and
7 improve range of motion and endurance. AR 161-62.

8 The remaining Kaiser records show almost bi-monthly
9 office visits to Dr Yu from July 1999 through May 2001. See AR
10 133-69, 191-203. Dr Yu's chart notes indicate plaintiff's sciatica
11 was treated with 600-800 milligrams of Motrin and a modified work
12 schedule consisting of alternating six hours of work per day with
13 eight hours per day from approximately October 1999 through April
14 2000. Id. Kaiser records from September 2001 through September
15 2003 indicate "persistent" left sciatica treated with 600
16 milligrams of Motrin twice a day. AR 350-55. These records
17 further indicate Dr Yu discussed the option of additional physical
18 therapy, which plaintiff declined. Id. Records from December 2003
19 through July 2004 indicate persistent left sciatica as well as a
20 presentation of right sciatica. AR 394-97. Finally, in an August
21 2004 MRI the interpreting radiologist indicated nerve root
22 encroachment could be "exaggerated when patient stands," but the
23 overall result was a "mild to moderate diffuse disc bulge at L5-S1"
24 with "no significant nerve root encroachment." AR 409.

25 Plaintiff claims she began seeing Dr Hood for acupuncture
26 treatment of her back injuries in October 1999. AR 61. While the
27 record purportedly includes Dr Hood's "[m]edical records covering
28 the period from April 29, 1997 to March 5, 2001," upon

1 examination, the records show plaintiff's first treatment with Dr
2 Hood as April 11, 2000. See AR 3, 116-32, 204-06. Dr Hood's
3 records indicate plaintiff received a series of fourteen thirty-
4 minute "electro acupuncture treatments" from April 2000 through
5 February 2001 (AR 119-21, 126, 128) and that she was first placed
6 on "disability" by Dr Hood in June 2000 due to "lower back pain."
7 AR 127. Further examination shows extension of plaintiff's
8 "disability" through July 2001 due to "HNP L-4-5," "HNP * * * L5-
9 S1," and "herniated disk disease in lower back." AR 123, 125.

10 Although Dr Hood placed plaintiff on "disability," the
11 record is, with one exception (discussed infra), devoid of records
12 of physical examinations, see AR 116-32, and consists principally
13 of acupuncture records concluding plaintiff "tolerated [the]
14 procedure[s] well" and "disability slips" stating plaintiff was
15 under the professional care of Dr Hood and had been "placed on
16 disability." Id. The only report of a medical exam is dated May
17 29, 2001. AR 411. In this report, Dr Hood indicates plaintiff
18 came to his office for evaluation and treatment following her May
19 2001 car accident. Id. The report indicates a positive straight
20 leg raising test "at 60 degrees for back pain, but no sciatica."
21 Id.

22 The administrative record also contains reports of
23 several consultative exams performed at the SSA's request. See AR
24 170-71, 198-203, 339-48, 356-67, 398-408, 413-18. Medical records
25 from consulting physicians date from June 2001, just after
26 plaintiff's initial application, through her final consultative
27 exam in November 2004. Id.

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1 Prior to the SSA's initial decision, plaintiff underwent
2 two consultative exams, one by an internist, the other by an
3 orthopedic surgeon. AR 170-71, 198-99. Burton Brody, MD performed
4 an internal medicine exam on June 20, 2001, and Michael Y Han, MD
5 conducted an orthopedic evaluation on June 8, 2002. Id. Dr
6 Brody's exam demonstrated that plaintiff had "some degree of age-
7 consistent degenerative changes in her lumbar spine" but consistent
8 objective findings were minimal and plaintiff had "no apparent
9 limitations." AR 171. Dr Han's thoracolumbar and lumbosacral
10 spine exam, by contrast, demonstrated a "significantly decreased
11 [range of motion] of the lumbosacral spine * * *, as well as
12 minimal to no extension with pain." AR 198-99. Dr Han recommended
13 restricting plaintiff's lifting and carrying to ten pounds
14 frequently and restricting her sitting to less than six hours per
15 day over an eight-hour day with periodic alternating of sitting and
16 standing. AR 199.

17 On November 3, 2003, Vicky Campagna, PhD, performed a
18 psychological evaluation and found plaintiff's "ability to function
19 in a work-related setting" to be unimpaired. AR 356-60. A
20 subsequent evaluation by Dr Campagna about one year later resulted
21 in similar findings. AR 425-29.

22 On November 17, 2003, John Chu, MD, performed a complete
23 orthopedic evaluation. AR 361-66. Dr Chu diagnosed plaintiff as
24 having "low back pain with left lower extremity radicular
25 symptoms." AR 365. Dr Chu noted a subjective "decreased sensation
26 to monofilament testing of 5%," found plaintiff able to lift up to
27 twenty-five pounds occasionally and to "stand, walk and sit for 6
28 hours in an 8-hour workday." Id. Dr Chu noted plaintiff "must be

1 allowed to periodically alternate [between] sitting and standing to
2 relieve pain and discomfort." Id. Dr Chu then ordered x-rays of
3 plaintiff's lumbar spine, which demonstrated "no compression injury
4 or disc narrowing" and resulted in an overall "negative
5 examination." AR 368.

6 On June 20, 2004, Rajeswari Kumar, MD, performed
7 plaintiff's third complete orthopedic evaluation. AR 339-43. Dr
8 Kumar found plaintiff's lumbar spine range of motion to be
9 restricted but found no clinical evidence of "radiculopathy" (i.e.
10 sciatica). AR 343. Dr Kumar further indicated plaintiff was able
11 to lift "10 pounds frequently" and sit for an unlimited amount of
12 time. Id.

13 Finally, on November 20, 2004, Adi Klein, MD, performed a
14 comprehensive internal medicine evaluation. AR 413-18. Dr Klein's
15 overall impression was "back pain due to disc disease by records
16 noting MRI L5, S1 disc disease with possible L5 impingement." AR
17 417. Dr Klein noted plaintiff appeared to be "resisting the
18 examination" and while results were inconsistent, plaintiff was
19 "able to change position and get on and off [the] examining table
20 without difficulty." Id.

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22 B

23 On January 12, 2001, plaintiff filed an application for
24 SSA benefits alleging disability due to back impairment, sciatica
25 and high blood pressure. AR 27, 29, 59, 256. The SSA denied
26 plaintiff's application both initially and upon reconsideration.
27 AR 29, 35. Plaintiff filed a timely request for a hearing before
28 an administrative law judge (ALJ) and on May 7, 2002, plaintiff,

1 unrepresented by counsel, plaintiff's witness and co-worker Valerie
2 Bolden and a vocational expert (VE) appeared before the ALJ. AR
3 30-40; AR 212.

4 Plaintiff's testimony included details about her hobbies,
5 injury, medical treatment and employment history. AR 216-35.
6 Plaintiff explained that constant pain in her lower back and left
7 leg kept her from working, that she tried to "deal with the pain"
8 instead of taking her medication and for that reason, her pain's
9 intensity varied. AR 224. Plaintiff's witness testified that she
10 worked with plaintiff at Thunder Road for five years and witnessed
11 plaintiff's difficulty with "getting up and down" from her desk.
12 AR 236. The VE testified that plaintiff's past work was "primarily
13 sedentary" and "on the cusp between skilled and semi-skilled." AR
14 238. And, in answering a series of hypothetical questions from the
15 ALJ, the VE opined that a person similarly situated to plaintiff
16 would not be able to do her past relevant work, but could work as a
17 cashier or survey worker. AR 246.

18 On September 24, 2002 the ALJ issued an unfavorable
19 decision finding that while plaintiff suffered from degenerative
20 disc disease which significantly limited her ability to perform
21 basic work activities, plaintiff's impairments did not "meet or
22 equal the criteria set forth in any applicable section of the
23 Listing of Impairments, 20 CFR Part 404, Subpart P, Appendix 1."
24 AR 16. Specifically, the ALJ found plaintiff's medical records
25 from Kaiser to be void of evidence of "nerve root compression with
26 neuro-anatomic distribution of pain, limitation of motion of the

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1 spine, motor loss, sensory or reflex loss and positive straight-leg
2 raising test as required by Section 1.04A for a Listing level
3 disorder of the spine." AR 13.

4 The ALJ found plaintiff had the residual functional
5 capacity (RFC) "to perform a limited range of light work, as
6 defined at 20 CFR § 404.1567(b), with sitting for 1 hour at a time
7 up to 6 hours per day, standing for 45 minutes at a time up to 8
8 hours per day, [with] occasional walking, bending, stooping,
9 kneeling, crouching, crawling and squatting," and that while
10 plaintiff was precluded from performing her past relevant work she
11 could perform work "existing in significant numbers in the local
12 and national economies * * *." AR 17. The ALJ based his decision
13 on the fact that all but one of plaintiff's physical examinations
14 at Kaiser were negative, she was only placed on a limited work
15 schedule by her treating physician, and it was not until she saw Dr
16 Hood that she was placed on full work restriction. AR 14.

17 The ALJ rejected Dr Hood's findings as "not supported by
18 medically acceptable clinical and laboratory diagnostic techniques"
19 and inconsistent with that of Dr Yu and the consultative exams of
20 Dr Brody and Dr Han. AR 14-15. The ALJ discredited plaintiff's
21 subjective statements of pain which allegedly precluded her from
22 working since, despite her complaints of severe pain, she underwent
23 a minimal treatment regimen of Motrin, physical therapy and
24 acupuncture and reported an "ability to perform some household
25 chores" and to "coach[] a children's track team several times each
26 week * * *." AR 15, 17. Further, it was not until Dr Yu
27 "suggested that [plaintiff] could return to work on an unlimited
28 basis" that she "sought out * * * Dr Hood, who declared her unable

1 to work," but without reporting objective findings in support of
2 his "proscription against all work." AR 15.

3 The ALJ's decision became final on February 7, 2003 when
4 the Appeals Council denied review. AR 5. Plaintiff then filed a
5 timely action for judicial review pursuant to 42 USC § 405(g) (See
6 Carter v Barnhart, No C 03-1518 CRB) and a new claim for benefits
7 dated September 10, 2003 (not included in current record). Upon
8 judicial review, the district court determined that while the ALJ
9 found plaintiff had the RFC to perform a "limited range of light
10 work," "the evidence only indicated that [plaintiff] could perform
11 work at the sedentary level." AR 281. Accordingly, the court
12 concluded that the ALJ's initial finding was not supported by
13 substantial evidence and remanded the case for "further proceedings
14 to determine if plaintiff's past work experience [could be]
15 transferable for sedentary work consistent with her limitations."
16 Id at 281, 282.

17 Pursuant to the district court's order, the Appeals
18 Council vacated the SSA's February 2003 decision and remanded the
19 case to an ALJ for further proceedings. AR 265. The Council
20 specifically ordered the ALJ to "provide [plaintiff] an opportunity
21 to appear at a hearing [and] develop the record * * *." Id. In
22 addition, the Council rendered plaintiff's September 10, 2003 claim
23 duplicative, "associated" the two claims, and ordered the ALJ to
24 issue a new decision based on the newly associated claims. AR 266.
25 On October 7, 2004, plaintiff - this time represented by counsel -
26 and a VE appeared before the same ALJ for the new hearing. AR 434.

27 At the second hearing, plaintiff testified that she
28 continued to experience constant pain in her left leg. AR 438-49.

1 Plaintiff also explained that while Dr Yu "recommended physical
2 therapy at Kaiser" it "is not the type of physical therapy place
3 that can help my back" and she could not afford outside therapy.
4 AR 442. Plaintiff went on to discuss her blood pressure, eyesight
5 and depression, which she had included in her second application.
6 AR 444. The VE testified that a hypothetical person similarly
7 situated to plaintiff could not perform her past relevant work, yet
8 could work as a self-service parking lot attendant or self-service
9 gas station cashier. AR 458-59.

10 Pursuant to the remand order, the ALJ determined that 20
11 CFR §§ 404.983, 404.977 and § I-2-8-18 of the Hearings, Appeals and
12 Litigation Law Manual (HALLEX) required him to conduct a new five-
13 step sequential analysis to determine plaintiff's disability
14 eligibility. AR at 258-263.

15 20 CFR § 404.983 provides:

16 When a [f]ederal court remands a case to the
17 Commissioner for further consideration, the
18 Appeals Council * * * may remand the case to an
19 [ALJ] * * *. If the case is remanded by the
20 Appeals Council, the procedures explained in §
21 404.977 will be followed. Any issues relating
22 to [a] claim may be considered by the [ALJ]
23 whether or not they were raised in the
24 administrative proceedings leading to the final
25 decision in [that] case.

26 20 CFR § 404.983. 20 CFR § 404.977(b) allows the ALJ to "take any
27 additional action that is not inconsistent with the Appeals
28 Council's remand order," and under HALLEX § I-2-8-18 (ALJ Decisions
in Court Remand Cases), "[w]hen the Appeals Council vacates a final
decision of the Commissioner, the ALJ must consider all pertinent
issues de novo." Accordingly, the ALJ examined "all of the
evidence of record including the new medical evidence submitted

1 since the date of [his] September 24, 2002 decision * * *," AR 258,
2 to determine whether plaintiff's alleged disability based on
3 "herniated disk disease with back and leg pain, hypertension,
4 retinitis pigmentosa, depression and equilibrium problems"
5 qualified her for disability benefits. AR 257.

6 The ALJ determined plaintiff's allegations of disabling
7 hypertension and retinitis pigmentosa were not supported by the
8 record, had no more than a "minimal effect" and were not severe.
9 AR 257. While the ALJ did not specifically address plaintiff's
10 allegations of equilibrium problems, he did find she suffered from
11 "medically determinable impairments diagnosed as degenerative disc
12 disease and an adjustment disorder" which "significantly limit her
13 ability to perform basic work activities, as set forth at 20 CFR §
14 404.1512, and must be deemed to be 'severe.'" AR 258. But the ALJ
15 determined that the evidence "fail[ed] to describe the degree of
16 functional limitation necessary to satisfy the 'B' criteria of
17 Section 12.04 for a Listing level affective disorder" and that
18 plaintiff was at all relevant times able to perform a wide range of
19 medium work. AR 259. As with his September 2002 decision, the ALJ
20 based this finding on medical evidence, plaintiff's statements and
21 his own observations. AR 259, 262.

22 First, the ALJ found plaintiff's treatment records from
23 Kaiser to be "consistently negative save for intermittent findings
24 of positive straight leg raising on the left." AR 259. The ALJ
25 again considered records from Dr Hood, which indicated plaintiff
26 "could not work at all," but rejected this opinion as "inconsistent
27 with other substantial evidence * * * including the opinion of Dr
28 Yu * * * and the opinion of Dr Brody, who * * * documented his

1 benign physical examination findings, and noted no deterioration in
2 [plaintiff's] condition over time." AR 260. The ALJ's rejection
3 of Dr Hood's finding was also based on the lack of "physical
4 examination findings to corroborate [his] conclusion." Id.

5 Second, the ALJ found determinative a series of
6 contradictory statements and actions on plaintiff's part. AR 262.
7 Although plaintiff reported "disabling symptoms," she also reported
8 an ability to "perform a variety of household chores." Id.
9 Further, while plaintiff reported difficulty walking without pain,
10 "she also stated that she has to take a walk 3-4 times each day to
11 relieve her * * * pain." Id. In addition, while plaintiff alleged
12 her inability to perform any work, she "reported that she is the
13 chairperson and owner of a children's track team[,] and in that
14 role she coaches the athletes several times each week * * *,
15 attends track meets, works on a computer and handles all of the
16 paperwork." Id. Finally, the ALJ asserted "[t]he lack of more
17 than very conservative treatment for [plaintiff's] allegedly
18 disabling back and leg pain, and the lack of any ongoing treatment
19 for her allegedly disabling depression," as well as inconsistencies
20 of plaintiff's "presentation and behavior during examinations and
21 at the hearing" cast doubt on her allegations and "suggest some
22 exaggeration of her symptoms." Id.

23 Based on the evidence, the ALJ issued a second
24 unfavorable decision, this time finding that plaintiff had the RFC
25 to perform a "wide range of medium work." AR at 264. Once the
26 second decision became final, plaintiff filed this timely action
27 for judicial review under § 405(g), asserting that the ALJ
28 "committed legal error by deviating from the court's [remand]

1 order" and conducting a second review of plaintiff's alleged
2 disability. Doc #6.

4 II

5 "The findings of the Commissioner of Social Security as
6 to any fact, if supported by substantial evidence, shall be
7 conclusive." 42 USC § 405(g). Accordingly, a district court may
8 overturn a decision to deny benefits only if the decision is (1)
9 not supported by substantial evidence or (2) if the decision is
10 based on legal error. Andrews v Shalala, 53 F3d 1035, 1039 (9th
11 Cir 1995) (citing Magallanes v Bowen, 881 F2d 747, 750 (9th Cir
12 1989)). When a reviewing court finds the ALJ's decision is
13 supported by substantial evidence, a finding that the ALJ committed
14 legal error will mandate the decision be set aside. Benitez v
15 Califano, 573 F2d 653, 655 (9th Cir 1978); Flake v Gardner, 399 F
16 2d 532, 540 (9th Cir 1968).

18 A

19 Plaintiff contends that on remand from the district
20 court, the ALJ committed legal error in conducting a full
21 reconsideration of her disability status and that such error
22 warrants reversal. Doc #6 at 10. Defendant, however, asserts the
23 ALJ's decision was "consistent with the [d]istrict [c]ourt's
24 [o]rder of [r]emand" as well as SSA regulations. Doc #7 at 2. For
25 the reasons stated below, the court finds the ALJ did not commit
26 legal error warranting reversal.

27 Plaintiff points to Sullivan v Hudson, 490 US 877, 886
28 (1989), in which the Supreme Court ruled "[d]eviation from the

1 court's remand order in [a] subsequent administrative proceeding[]
2 is itself legal error, subject to reversal on further judicial
3 review." While the Sullivan court did not identify the particular
4 legal doctrines in support of its conclusion, plaintiff points to
5 two: (1) the law of the case and (2) the rule of mandate. Doc #6
6 at 10. "Under the 'law of the case' doctrine, a 'court is
7 generally precluded from reconsidering an issue that has already
8 been decided by * * * a higher court in the identical case.'" United States v Alexander, 106 F 3d 874, 876 (9th Cir 1997) (citing
9 Thomas v Bible, 983 F 2d 152, 154 (9th Cir 1993) (cert denied)).
10 Under the rule of mandate, "lower courts are obliged to execute the
11 terms of a mandate" but are free to do "anything not foreclosed by
12 the mandate.'" United States v Kellington, 217 F 3d 1084, 1092
13 (9th Cir 2000) (citing Herrington v County of Sonoma, 12 F 3d 901,
14 904 (9th Cir 1993)). In certain situations "an order issued after
15 remand may deviate from the mandate * * * if it is not counter to
16 the spirit of the circuit court's decision * * *.'" Id at 1093
17 (citing Lindy Pen Co v Bic Pen Corp, 982 F 2d 1400, 1404 (9th Cir
18 1993)).
19

20 Defendant contends, and plaintiff concedes, that there is
21 no published opinion of the Ninth Circuit applying either doctrine
22 under the circumstances. Doc #7 at 4; Doc #6 at 10. Plaintiff,
23 however, cites a number of cases from other circuits applying one
24 or both of these doctrines in cases remanded to an ALJ by a federal
25 court. See Key v Sullivan, 925 F 2d 1056, 1060 (7th Cir 1991)
26 (applying the law of the case doctrine); Wilder v Apfel, 153 F 3d
27 799, 803 (7th Cir 1998) (applying the law of the case doctrine);
28 Brachtel v Apfel, 132 F 3d 417, 419 (8th Cir 1997) (acknowledging

1 the law of the case doctrine applies to administrative agencies on
2 remand); Gribsby v Barnhart, 294 F 3d 1215, 1218 (10th Cir 2002)
3 (applying the law of the case and the rule of mandate to judicial
4 review of administrative decisions). Doc #6 at 10. Plaintiff also
5 cites Ischay v Barnhart, 383 F Supp 2d 1199 (C D Cal 2005), as an
6 example of a federal district court which, in the absence of Ninth
7 Circuit precedent, has found "the doctrine of the law of the case
8 and the rule of mandate [applicable] to matters remanded to [an]
9 [a]gency for further proceedings." Ischay, 383 F Supp at 1216. In
10 support of its finding, the Ischay court relied on cases from other
11 circuits. Id.

12 Plaintiff argues that when the ALJ "abandoned his
13 original [finding of plaintiff's RFC] * * *" and found plaintiff
14 capable of "perform[ing] medium work * * *," he ignored the
15 "binding law of the case" (that plaintiff was limited to sedentary
16 work) and "failed to comply with the [c]ourt's mandate * * *. Doc
17 #6 at 11-12. Defendant, however, contends that the ALJ's decision
18 to "consider all of the issues related to [p]laintiff's claim for
19 disability benefits, including those considered at the time of the
20 original decision" as well as "new material evidence submitted
21 since the[n] * * *," was a "reasonable interpretation of the
22 [d]istrict [c]ourt's order" and was consistent with "Social
23 Security regulations * * *." Doc #7 at 3. Defendant is correct
24 for two reasons.

25 First, plaintiff's argument ignores the fact that
26 determinations of disability, even after approval, are subject to
27 periodic review. 20 CFR § 404.1590. Not only did two years pass
28 between the ALJ's initial determination and his new finding, but

1 new medical evidence, including additional visits to Dr Yu as well
2 as two consultative psychological exams and three consultative
3 physical exams, were added to the record. See AR 339-43, 350-66,
4 394-97, 409, 413-18, 425-29. Accordingly, review of plaintiff's
5 disability status would have been timely in any event.

6 Second, the ALJ's actions were supported by the
7 controlling federal regulations: 20 CFR §§ 404.983, 404.977 and
8 404.1520. Under 20 CFR § 404.983 (discussed supra), upon remand,
9 "[a]ny issues relating to [a] claim may be considered by the [ALJ]
10 whether or not they were raised in the administrative proceedings
11 leading to the final decision in [that] case." Under 20 CFR §
12 404.977 (also discussed supra), the ALJ "may take any additional
13 action that is not inconsistent with the Appeals Council's remand
14 order." 20 CFR § 404-977(b). 20 CFR § 404.1520(a)(3) provides
15 that "all evidence in [the claimant's] case record" will be
16 considered when "mak[ing] a determination or decision whether [the
17 claimant] is disabled." These sections, taken together, support
18 the proposition that the ALJ has authority to reconsider
19 plaintiff's disability upon remand as long as such reconsideration
20 is consistent with the remand order.

21 In its remand order, the court found there were
22 "outstanding issues" which precluded the court from "making a
23 disability determination on the merits * * *." AR 282.
24 Plaintiff's reliance on specific language directing "further
25 proceedings to determine if plaintiff's past work experience is
26 transferable for sedentary work consistent with her limitations" is
27 misplaced. Doc #6 at 9. Again, plaintiff is disregarding the
28 ALJ's broad direction to make disability determinations on the

1 merits. AR 282. As defendant points out, "[t]he ALJ reasonably
2 determined that, ultimately, the court's remand order required him
3 to determine whether [p]laintiff was disabled at any time since her
4 alleged disability onset date." Doc #7 at 5.

5 Since the ALJ's actions were both consistent with the
6 remand order and the controlling federal regulations, there was no
7 legal error warranting reversal. For these reasons, and because,
8 for the purposes of this appeal, plaintiff concedes that she was
9 not disabled prior to her fiftieth birthday (Doc #6 at 13), the
10 sole issue to be determined is whether the ALJ's March 17, 2005
11 finding that plaintiff is capable of performing a wide range of
12 medium work is supported by substantial evidence.

13
14 B

15 In his March 17, 2005 decision, the ALJ found plaintiff
16 not disabled under the Act. AR 264. This decision is supported by
17 substantial evidence.

18 Disability under the Act is defined as "the inability to
19 do any substantial gainful activity by reason of any medically
20 determinable physical or mental impairment * * * which has lasted
21 or can be expected to last for a continuous period of not less than
22 12 months." 20 CFR § 404.1505(a). To determine whether a claimant
23 is disabled, the ALJ conducts the five-step sequential analysis set
24 forth in 20 CFR § 404.1520(a)(4)(i)-(v). Step one considers
25 whether the claimant is currently employed in substantial gainful
26 activity. If not, the second step asks whether the claimant has a
27 severe impairment. If the claimant's impairment or combination of
28 impairments is deemed "severe," step three determines whether the

1 condition meets or equals the conditions set forth in the Listing
2 of Impairments in Part 404 of the Regulations, Subpart P, Appendix
3 1. If the claimant does not have a "listing level" impairment,
4 step four asks whether the claimant can perform her past relevant
5 work. If not, step five considers whether the claimant has the
6 ability to perform other work which exists in substantial numbers
7 in the national economy. The ability to perform other work
8 mandates a finding of not disabled. 42 USC § 1382c(a)(3)(B); 20
9 CFR §§ 404.1520(b)-(g).

10 When evaluating a mental impairment, the ALJ employs a
11 "special technique" during his analysis. 20 CFR § 404.1520a(a).
12 Use of the "technique" must be documented in the ALJ's decision and
13 "include a specific finding as to the degree of [plaintiff's]
14 limitation * * *" in (1) "[a]ctivities of daily living," (2) "social
15 functioning," (3) "concentration, persistence, or pace" and (4)
16 "episodes of decompensation." 20 CFR §§ 404.1520a(c)(3),
17 404.1520a(e).

18 Plaintiff contends the ALJ's finding that plaintiff was
19 capable of performing a wide range of medium work is not supported
20 by substantial evidence in that the ALJ "substituted his own
21 judgment for the opinions of the treating and examining
22 physicians." Doc #6 at 10. Defendant asserts the finding is
23 substantially supported by "[n]ew evidence, including medical
24 information" which confirmed that plaintiff was not credible and
25 that she was in fact capable of performing a wide range of medium
26 work. Doc #7 at 5-6.

27 In determining whether an ALJ's decision is supported by
28 substantial evidence, the reviewing court considers the

1 administrative record as a whole. Andrews, 53 F3d at 1039.
2 Substantial evidence is "more than a mere scintilla but less than a
3 preponderance; it is such relevant evidence as a reasonable mind
4 might accept as adequate to support a conclusion. Id at 1039-40.
5 The ALJ's decision must be upheld where "the evidence is
6 susceptible to more than one rational interpretation." Id. It is
7 not within the jurisdiction of the court to determine credibility
8 or to resolve conflicting medical testimony or ambiguities in the
9 record. Id.

10 While neither party dedicates more than a few sentences
11 to the ALJ's analysis in their briefs, See Doc #6; Doc #7, it is
12 clear that steps one and two are not at issue. There is ample
13 evidence (in the form of testimony and medical findings) in the
14 record to support the ALJ's determinations that plaintiff has not
15 engaged in any substantial gainful activity since June 23, 2000 and
16 that plaintiff suffers from "severe" impairments (degenerative disc
17 disease and adjustment disorder) which significantly limit her
18 ability to perform basic work activities. AR 258. Accordingly,
19 the court will limit its discussion to steps three through five of
20 the ALJ's analysis.

21 1

22 Step three requires the ALJ to analyze a claimant's
23 "severe" impairments and consider whether the impairments meet the
24 "listing level" criteria set forth in 20 CFR Part 404, Subpart P,
25 Appendix 1. Here, the ALJ found neither plaintiff's degenerative
26 disc disease nor her adjustment disorder to be "listing level."
27 Both findings are supported by substantial evidence.

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1 Section 1.04(A) of the Appendix sets forth requirements
2 for a "listing level" spine disorder and requires evidence of:

3 Nerve root compression characterized by neuro-
4 anatomic distribution of pain, limitation of
5 motion of the spine, motor loss (atrophy with
6 associated muscle weakness or muscle weakness)
accompanied by sensory or reflex loss, and * * *
positive straight-leg raising test[s].

7
8 20 CFR Part 404, Subpart P, Appendix 1 § 1.04(A). In conducting
9 his analysis, the ALJ found plaintiff's most recent medical records
10 relating to her disc disease failed to meet listing level criteria.
11 While plaintiff's 1997 Kaiser MRI described "impingement on * * *
12 [plaintiff's] nerve-root axillae * * *," AR 132, her August 2004
13 MRI indicated a lack of "significant nerve root encroachment." AR
14 409. While a 2002 examination by consulting physician Dr Han
15 showed a "significantly decreased [range of motion] of the
16 lumbosacral spine," AR 198, plaintiff's more recent Kaiser records
17 consistently indicated "good strength" and a lack of sensory loss.
18 AR 350-54; AR 394-96. Finally, while plaintiff's Kaiser records
19 indicated positive straight-leg raising tests as recently as April
20 2004, See AR 394-96, both of plaintiff's 2004 consultative exams
21 noted "inconsistent" results. AR 341, 417. Despite identification
22 of positive straight-leg raising tests, plaintiff's August 2004 MRI
23 and recent Kaiser records represent the substantial evidence
24 necessary to uphold the finding that plaintiff's medical records
25 did not meet the "listing level" criteria set forth in 20 CFR Part
26 404, Subpart P, Appendix 1 § 1.04(A).

27 In order to be considered "listing level," an adjustment
28 disorder must meet the criteria set forth in § 12.04 of the

1 Appendix. An ALJ's complete analysis of plaintiff's mental
2 impairment under § 12.04, if properly documented in his decision,
3 constitutes fulfillment of 20 CFR § 404.1520a's requirement to
4 apply the "special technique" (see supra). Here, the ALJ found
5 that plaintiff's medical records failed to describe the degree of
6 functional limitation necessitated by § 12.04. AR 259. This
7 finding is supported by substantial evidence and was properly
8 documented to fulfill the § 404.1520a requirement.

9 Under § 12.04, if "a disturbance of mood, accompanied by
10 a full or partial manic or depressive syndrome" is not a documented
11 "chronic affective disorder of at least 2 years" there must be
12 evidence of:

13 Medically documented persistence, either
14 continuous or intermittent of * * * depressive
15 syndrome * * * resulting in at least two of the
16 following: (1) [m]arked restriction of
17 activities of daily living, (2) [m]arked
18 difficulties in maintaining social functioning,
19 (3) [m]arked difficulties in maintaining
20 concentration, persistence, or pace or (4)
21 [r]epeated episodes of decompensation, each of
22 extended duration.

23 20 CFR Part 404, Subpart P, Appendix 1 § 12.04. While there is no
24 evidence that plaintiff's adjustment disorder is a "chronic
25 affective disorder of at least 2 years," Kaiser records support a
26 finding that plaintiff suffers from depressive syndrome. AR 354;
27 AR 395-96. Accordingly, in order to be "listing level" the
28 disorder must meet two of the four criteria set forth in § 12.04
(see supra). The ALJ's finding that plaintiff's impairment does
not meet the requisite criteria is supported by substantial
evidence.

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1 The ALJ found that plaintiff's adjustment disorder
2 created "no more than a mild restriction of activities of daily
3 living" and that there were no "[marked] difficulties in
4 maintaining social functioning." AR 259. The ALJ based these
5 findings on plaintiff's "reported [] ability to perform a variety
6 of household chores[,] [] [to] care for her son" and to "get along
7 well with friends and neighbors * * *." AR 259. The record
8 supports these findings. In her 2004 hearing, plaintiff stated she
9 wakes up by six-thirty in the morning, takes a shower, a short
10 walk, and does light housekeeping. AR 259; AR 445-47. Plaintiff
11 also stated she does not sleep during the day and that, for the
12 most part, she gets along well with family and friends. AR 447-48.
13 Additionally, Dr Campagna's November 2004 psychological evaluation
14 indicates that while plaintiff reported "poor" sleep and appetite,
15 she "volunteer[s] with [a] track team, work[s] on her computer * *
16 * tak[es] short walks * * *" and has "good to excellent
17 interpersonal relationships." AR 426. The ALJ also found that
18 plaintiff's only psychological exams show no more than "mild
19 difficulties in maintaining concentration, persistence or pace, and
20 there is no evidence of episodes of decompensation * * *." AR 259.
21 An examination of the record supports this finding.

22 Since the ALJ's findings regarding the four criteria in §
23 12.04 are substantially supported by the record and because the ALJ
24 documented his complete analysis as required by § 404.1520a, it was
25 proper for the ALJ to move on to steps four and five of the
26 sequential analysis.

27 \\
28 \\
29

Under step four, when a claimant's impairments cannot be considered "listing level," the ALJ must assess the claimant's RFC to determine the most work she "can still do despite * * * limitations." §§ 404.1520(e); 404.1545(A)(1); 404.1546(c). The ALJ found plaintiff, at all relevant times, capable of performing a "wide range of medium work as defined at 20 CFR § 404.1567(c), with a slight limitation in performing detailed work." AR 259.

Under the "[p]hysical exertion requirements" set forth in § 404.1567, medium work "involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds." 20 CFR § 1567(c). If someone can do medium work, [it is] determine[d] that he or she can also do sedentary and light work." Id. Section 404.1567(a) defined sedentary work as:

[I]nvolv[ing] lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 CFR § 404.1567(a). Section 404.1567(b) defines light work as:

[I]nvolv[ing] lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls."

20 CFR § 404.1567(b).

The ALJ found that the medical evidence and plaintiff's statements and conduct undermined her allegations of disabling

1 symptoms in reference to both her degenerative disc disease and
2 mental condition. AR 259-63. This finding was supported by
3 substantial evidence.

4 The ALJ's finding regarding plaintiff's mental condition
5 warrants little discussion. While Dr Yu's records indicate an
6 impression of "depression/stress" (AR 354, 395-96), there is
7 nothing to show that Dr Yu at any time prescribed anti-depressants
8 or referred plaintiff to a therapist. In fact, plaintiff testified
9 that "a psychologist * * * would not do any good * * *" (AR 454),
10 and the only psychological examinations on the record come from the
11 consulting psychologist, who found plaintiff's "ability to function
12 in a work-related setting" to be unimpaired except for a slight
13 limitation to perform detailed work. AR 360, 428. The consulting
14 psychologist also found plaintiff's mood to be "within normal
15 limits," and her memory, concentration, fund of knowledge, insight
16 and judgment to be "adequate." AR 427. The complete lack of
17 evidence of treatment for plaintiff's adjustment disorder
18 substantially supports the ALJ's finding that the disorder did
19 nothing more than slightly limit plaintiff's ability to perform
20 detailed work.

21 Turning to plaintiff's degenerative disc disease,
22 plaintiff "alleged an inability to perform all work due to her pain
23 and other symptoms." AR 262. Based on the medical evidence
24 concerning plaintiff's back injury and plaintiff's statements and
25 conduct, the ALJ found plaintiff capable of performing a wide range
26 of medium work. AR 259. This finding is supported by substantial
27 evidence.

28 \\\

1 Regarding plaintiff's medical treatment, the evidence
2 demonstrates that despite complaints of severe pain, treatment
3 consisting of, at most, Motrin, physical therapy and acupuncture
4 was at all times conservative. In the 2004 hearing, plaintiff
5 testified that she does not take the Motrin prescribed because she
6 is "not a person that likes to take pills." AR 442. The record
7 also demonstrates that plaintiff declined additional physical
8 therapy sessions because it "is not the type * * * than can help
9 [her] back." Id. And, although there is nothing in plaintiff's
10 treating records to prove plaintiff saw a surgeon, she testified
11 that she "refused the back surgery * * *" because Dr Hood advised
12 it would cause her to become unable to walk. AR 443.

13 A careful examination of all available Kaiser records
14 confirms the ALJ's determination that "save for intermittent
15 findings of positive straight leg raising on the left" plaintiff's
16 Kaiser records have been consistently negative for significant
17 findings. AR 259. Further, it does not appear that Dr Yu at any
18 time restricted plaintiff's lifting or carrying and the last time
19 Dr Yu limited plaintiff's sitting was over six years ago, in April
20 2000.

21 In addition, in June 2004 Dr Kumar found plaintiff able
22 to lift "10 pounds frequently" and sit for an unlimited amount of
23 time. AR 343. And, while Dr Hood did deem plaintiff "disabled,"
24 there is a lack of objective evidence to support this finding;
25 moreover, the last records from Dr Hood show plaintiff was only
26 "disabled" through July 2001, over five years ago. AR 123, 125.
27 Moreover, while Dr Chu found plaintiff able to lift up to 25 pounds
28 occasionally and to "stand, walk and sit for 6 hours in an 8-hour

1 workday" with the ability "to periodically alternate sitting and
2 standing to relieve pain and discomfort," AR 365, Dr Chu submitted
3 these findings in November 2003, almost one year prior to
4 plaintiff's negative MRI in August 2004. And, while Dr Klein noted
5 plaintiff was able to lift "10 pounds frequently" and to "sit for 6
6 hours with appropriate breaks," AR 417, as the ALJ noted, Dr Klein
7 based his conclusion "on a finding of possible L5 impingement"
8 which he was unable to confirm "due to [plaintiff's] apparent
9 intentional refusal to comply with [Dr Klein's] attempt to conduct
10 a thorough examination." AR 261. Accordingly, the ALJ found Dr
11 Klein's conclusions unsupported. Id.

12 In addition to the medical evidence, the ALJ did not find
13 plaintiff's statements to be "particularly convincing or credible."
14 When an ALJ assesses a claimant's credibility, "[t]hat assessment
15 must be given great weight." Rashad v Sullivan, 903 F2d 1229, 1231
16 (9th Cir 1990) (citing Hudson v Bowen, 849 F 2d 433, 434 (9th Cir
17 1988)). But for an ALJ to reject a claimant's subjective
18 statements of pain involving their alleged disability, he must
19 provide "specific, cogent reason[s] for the disbelief." Id.
20 Plaintiff's testimony "may not be entirely discounted simply
21 because [of] a lack of objective findings." Id (internal
22 quotations omitted).

23 Here, the ALJ sufficiently documented his finding that
24 plaintiff was not credible. The ALJ pointed to plaintiff's
25 contradictory statements that despite allegedly disabling pain,
26 plaintiff can bathe and groom herself, perform household chores,
27 walk short distances and volunteer as a track coach. AR 434-54.
28 This evidence, taken together with plaintiff's medical records,

1 substantially supports the finding that plaintiff has the RFC to
2 perform a wide range of medium work with a slight limitation in
3 performing detailed work.

4 In his decision, the ALJ determined that plaintiff's RFC,
5 the fact that she was closely approaching advanced age and her
6 level of education mandated a finding of not disabled under Rules
7 203.21 and 203.22 of the Medical-Vocational Guidelines
8 (Guidelines).

9 Plaintiff, who concedes she was not disabled prior to
10 turning fifty, is, under the Rules, a "person closely approaching
11 advanced age," § 404.1563(d), with a "high school education and
12 above." § 404.1564(b)(4). Given plaintiff's RFC to perform a wide
13 range of medium work, Rules 203.22 and 203.23 of the Guidelines
14 "direct a finding of 'not disabled.'" 20 CFR Part 404, Subpart P,
15 Appendix 2 §§ 203.22, 203.23. According to the VE who testified at
16 plaintiff's hearing, plaintiff was incapable of performing her past
17 relevant work. AR 458.

18 If a claimant is not disabled and cannot perform her past
19 relevant work, the ALJ moves on to step five and determines if the
20 claimant's RFC is such that she is capable of performing other work
21 that exists in significant numbers in the national economy. §
22 404.1560(C). If a claimant can adjust to other work, the ALJ will
23 find her not disabled under the Act. § 404.1520(g). In
24 plaintiff's hearing, the VE testified plaintiff's RFC is such that
25 she is capable of performing other work that exists in significant
26 numbers in the national economy. Accordingly, the ALJ's
27 determination that plaintiff is not disabled under the Act is
28 upheld.

III

Since there was no legal error and the ALJ's decision was supported by substantial evidence, plaintiff's motion for summary judgment is DENIED and the government's motion is GRANTED. The clerk is directed to enter judgment in favor of defendant and against plaintiff.

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Judge